APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7751

November Term, 1964

TENNESSEE GAS TRANSMISSION COMPANY, *Petitioner*

vs.

FEDERAL POWER COMMISSION, *Respondent*

PENNSYLVANIA PUBLIC UTILITY COMMISSION and THE COMMONWEALTH OF PENNSYLVANIA, *Intervenors*

On Petition to Review an Order of the
Federal Power Commission

Stanley M. Morley of May, Shannon and Morley, Washington, D.C., (W. C. Braden, Jr., and B. J. Williamson, Houston, Texas, were with him on the brief) for Petitioner.

Howard E. Wahrenbrock, Solicitor, (Richard A. Solomon, General Counsel, Robert L. Russell, Asst. General Counsel, and Israel Convisser, Washington, D.C., were with him on the brief) for Respondent.

Before MURRAH, Chief Judge, and PHILLIPS and LEWIS, Circuit Judges.

LEWIS, Circuit Judge.

This case is related to but not determined by our consideration in Pan American Petroleum Corporation v. FPC, No. 7659, this day decided, and brings the petitioner

Tennessee Gas Transmission Company seeking review under section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), of an order of the Federal Power Commission. The subject order is premised upon a finding that Tennessee constructed and is operating facilities for the transportation and sale of gas without the requisite Commission authorization and orders Tennessee to take steps to bring it in compliance with the provisions of the Natural Gas Act.

On December 1, 1960, Tennessee acquired from Pan American, through a non-jurisdictional conveyance of oil and gas leases, extensive interests in the Bastian Bay Field in Louisiana. On October 4, 1960, Tennessee had applied to the Commission for a so-called "budget-type" certificate of public convenience and necessity for the calendar year 1961 which, upon approval, would authorize Tennessee to expend not more than $5,000,000 for the construction and operation of gas purchase facilities with a limitation of $500,000 upon the total cost of a single facility. The application was approved and, on January 6, 1961, the Commission issued the certificate as requested by Tennessee. Thereafter, Tennessee, in reliance upon this "budget-type" certificate, constructed a pipeline from the Bastian Bay Field into its main transmission line, a distance of 2.63 miles with a cost of approximately $288,000. The practical effect of the construction was to attach to the Tennessee distribution system the potential of 750 billion cubic feet of natural gas at an estimated cost of $159,463,500.

The Commission, after it obtained knowledge but not notice of Tennessee's acquisition of the Pan American leases and the construction of the pipeline, reopened the proceedings related to the issuance of the "budget-type" certificate to explore the question of whether Tennessee's connecting facility was authorized by the certificate. After a hearing which was expanded to consider the jurisdictional

aspects of the Pan American-Tennessee conveyance, the Commission determined that the construction of the Bastian Bay Field pipeline was not within the actual or legal contemplation of the "budget-type" certificate and was thus an unauthorized facility within the Commission's jurisdiction. We think it almost self-evident that the ruling and order of the Commission in such regard are manifestly correct and proper when projected against the over-all purpose of the Natural Gas Act and the policy, purpose and procedure pertaining to the issuance of "budget-type" certificates.

Whenever natural gas is dedicated to interstate commerce it is the manifest duty of the Commission to scrutinize the transaction in all its facets to the end determination of the public convenience and necessity. *Atlantic Refining Co.* v. *Public Service Comm'n* (*CATCO*), 360 U.S. 378, 391-92. This duty cannot be declined by regulation or otherwise nor can it be postponed absent consent of those immediately concerned. *Sunray Mid-Continent Oil Co.* v. *FPC*, 10 Cir., 270 F. 2d 404. The Commission cannot pre-grant a certificate and by so doing lose its basic jurisdiction to exercise regulatory powers. To do so would be to abandon the administrative process. But the Commission may adopt regulatory policies and procedures which further the purposes of the Act and result in practical and desirable abridgments to the accomplishment of those purposes. Such is clearly the intent of the Commission in its issuance of "budget-type" certificates and its expressed policy and regulatory aids pertaining thereto.[1]

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[1] The applicable regulation provides (18 CFR § 2.58): "Budget-type certificate applications—gas purchase facilities.

"In accordance with the Commission's advice in Order No. 185, issued February 8, 1956 (15 FPC 793 at 794) and unless prevented by other factors, such as interventions in opposition, we will issue budget-type authorizations to natural gas pipeline companies covering the construction and operation of gas purchase facilities after hearing under the abridged procedure, upon applications for cer-

That a "budget-type" certificate is intended by the Commission to apply only to routine expenditures which would

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tificates of public convenience and necessity, filed under § 157.6 of this chapter, provided that:

"(a) The total estimated cost of the facilities to be installed in a given twelve-month period does not exceed 1½ percent of the applicant company's plant account or $5,000,000 whichever is the lesser.

"(b) The total cost of any single project facilities to be installed during the authorization period does not exceed 25 percent of the total budget amount or $500,000, whichever is the lesser.

"(c) The applicant agrees to file with the Commission, within sixty days after expiration of the authorization, a statement showing for each individual project:

"(1) Description of facilities installed, i.e., miles and size of pipelines, compressor horsepower, metering facilities.

"(2) Location of facilities.

"(3) Actual installed cost of facilities subdivided by size of pipe, compressing, metering and appurtenant facilities.

"(4) Estimated recoverable gas reserves in Mcf at 14.73 psia made available to applicant by means of the facilities.

"(5) Names of fields connected.

"(6) The names of the independent producers from whom the gas is being purchased together with the respective dates of the gas sales contracts and the docket number of the related seller.

"(d) 'Gas purchase facilities' means those facilities necessary to connect the applicant's system with the facilities of a seller authorized by this Commission to make a sale for resale in interstate commerce to the applicant."

And the expressed policy of the Commission describes the budget-type application as

> ". . . a single certificate application covering in general outline along the lines of a budget estimate the proposed routine construction intended to be undertaken by it during the current or ensuing fiscal year, listing the facilities proposed, the estimated cost of each item, the capacity, purpose, and time of intended construction, customers affected by each facility proposed, effect of proposals upon gas supply and deliverability rates, service, and other pertinent information." 15 F.P.C. 793 at 794 (Order No. 185), 21 Fed. Reg. 1485.

leave but an unnoticeable impact upon price structure, and that Tennessee so understood the limitation, is made manifest by Tennessee's application. The company there stated:

> "During the present calendar year Applicant has substantially improved its over-all system gas supply. This has been made possible in part by the ability of Applicant to attach new reserves pursuant to its 'budget-type' authorization to construct the necessary facilities without the time consuming requirement of obtaining specific authorization. In addition, the 'budget-type' authorization enabled certain of the independent producers to initiate the sale of gas to Applicant pursuant to Section 157.28 of the Commission's Regulations Under the Natural Gas Act, pending final Commission action on their certificate applications.
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> "When granted, the authorization requested herein will relieve Applicant of the time and expense of preparing numerous relatively minor certificate applications, and the Commission and its Staff of the burden of processing such routine applications. Furthermore, this application is consistent with the policy declaration of the Commission contained in its Order No. 185."

And it is equally apparent that Tennessee did not contemplate that the certificate would cover the Bastian Bay Field project because, although the transaction with Pan American was imminent, Tennessee stated in its application that it did "not know the quantity or location of the gas supply to be connected to Applicant's system as contemplated herein."

We are not impressed with the emphasis that Tennessee places upon the admitted fact that its connecting facility was constructed in literal compliance with the monetary restrictions contained in the "budget-type" certificate. The fact that the proximity of Tennessee's main transmission line to the vast resources of the Bastian Bay Field allowed

the pipeline to be built at a cost of $288,000 is a mere economic coincidence and does not unequivocally establish the the construction as routine or minor in nature. The very term "budget-type" contemplates an anticipated projection of probable expenditures for routine maintenance and expansion of such minor impact upon price structure that a blanket advance approval, rather than the delay and difficulty of standard administrative practice, is warranted. The acquisition and utilization of the Bastian Bay resources were neither routine nor minor in their impact, and the very magnitude of the event was properly considered by the Commission as a factor negativing the authority claimed under the "budget-type" certificate.

So, too, we find no merit in Tennessee's contention that, even if the construction was not covered by the certificate, the Commission erred by reopening the earlier proceedings. While it admits that the Commission may have been able to issue a show cause order or to begin new proceedings to determine that Tennessee had exceeded its authorization, it claims that the Commission must strictly follow the procedures outlined by the governing statutes and regulations and could not alter, amend, or revoke the certificate, that had become final, by reopening the proceedings. In support of this contention Tennessee relies on *United States* v. *Seatrain Lines,* 329 U.S. 424, which held that the Interstate Commerce Commission was without authority to reopen certification proceedings to cancel or amend a certificate of public convenience and necessity, and *CAB* v. *Delta Air Lines, Inc.,* 367 U.S. 316, which held that the Civil Aeronautics Board could not alter a certificate of public convenience and necessity once it had become effective without complying with the statutory requirements of formal notice and hearing. Neither of these cases supports Tennessee's contention; in the case at bar the Commission did not purport to alter or revoke Tennessee's certificate but merely to determine whether the pipeline construction was authorized by the order and certificate

as granted. Since Tennessee was not prejudiced by the Commission's actions, the fact that the original proceedings were reopened can be of no significance.

The order of the Commission is affirmed.

Judgment

Thirty-Second Day, November Term, Wednesday, December 30th, 1964.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Orie L. Phillips and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on petition to review an order of the Federal Power Commission and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the Federal Power Commission be and the same is hereby affirmed.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7659

November Term, 1964

PAN AMERICAN PETROLEUM CORPORATION, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

PENNSYLVANIA PUBLIC UTILITY COMMISSION and THE COMMONWEALTH OF PENNSYLVANIA, *Intervenors*

On Petition to Review an Order of the Federal Power Commission

Carroll L. Gilliam, Washington, D.C., (J. P. Hammond, Karl R. Goldsmith and Clifford O. Stone, Jr., Tulsa, Oklahoma, William J. Grove, Washington, D.C., and O'Bryan, Grove, Paglin, Jaskiewicz, Sells, Gilliam & Putbrese, Washington, D.C., Of Counsel, were with him on the brief) for Petitioner.

Howard E. Wahrenbrock, Solicitor, (Richard A. Solomon, General Counsel, Robert L. Russell, Asst. General Counsel, and Israel Convisser, Washington, D.C., were with him on the brief) for Respondent.

Before MURRAH, Chief Judge, and PHILLIPS and LEWIS, Circuit Judges.

LEWIS, Circuit Judge.

Pan American Petroleum Corporation seeks review under section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), of an order of the Federal Power Commission

wherein the Commission assumed jurisdiction under section 7 of the Act over a transaction between Pan American and Tennessee Gas Transmission Company, the latter company being an interstate natural gas pipeline company. The dispositive question is whether the subject transaction constituted an assignment of oil and gas leases and was thus exempt under section 1(b) of the Act,[1] *FPC* v. *Panhandle Eastern Pipeline Co.*, 337 U.S. 498, or a sale of gas for resale in interstate commerce and so was under the regulatory cognizance of the Commission, *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672.

During the years 1954 through 1959 Pan American acquired twelve leases upon what was initially undeveloped acreage in what is now known as the Bastian Bay Field in Plaquemines Parish, Louisiana. In December, 1955, an exploratory well was completed and thereafter a total of 32 wells were drilled upon six of the leases by Pan American either as wholly owned wells or in conjunction with others sharing operating rights. No wells were drilled upon the other six leases. Although the field was proven, Pan American made no sales for consumption, did not connect the wells to an interstate transmission pipeline or collection facilities and did not establish any permanent production units. Such quantities of gas as were produced were flared or consumed in the field.

On December 1, 1960, Pan American conveyed its interests to Tennessee for a stated price of $159,463,500 pursuant to a contract designated as a Lease Sale Agreement and consummated by an "Assignment and Conveyance." Of this price, Tennessee paid $9,427,104 at the time of transaction and obligated itself for seventeen further annual payments evidenced by promissory notes. The agreed price was based upon estimated reserves and pro-

[1] Section 1(b) provides, *inter alia*, that the Commission's jurisdiction shall not reach "facilites used for . . . the production or gathering of natural gas." 15 U.S.C. § 717(b).

vided for re-determination of the reserves upon the request of either party between 1969 and 1973, and for adjustment of the purchase price on the basis of such determination. The pricing formula was equated to 21¢ per Mcf. for the reserves attributable to the interest assigned. Tennessee agreed to develop and produce the leases and to negotiate contracts with royalty owners for the payment of royalties and reimbursement of Louisiana severance taxes. And the assignment was subject to the following reservations: (1) Pan American retained its rights in minerals other than natural gas, oil, and other petroleum liquids; (2) Pan American retained its rights in the leases below the bottom of the deepest presently-known productive horizons; (3) Pan American reserved as a production payment all proceeds received by Tennessee from the sale of oil produced on the leased acreage, such payments to terminate when 85 per cent of the recoverable reserves of oil have been produced; (4) Pan American reserved a similar production payment for proceeds received by Tennessee from the sale of separator liquids, with detailed provisions relating to the deduction of Tennessee's costs and expenses; and (5) Pan American retained the right to process all gas produced from the assigned leaseholds, including that attributable to certain outstanding royalty interests, for recovery of natural-gas liquids, agreeing to pay Tennessee for plant losses and use of gas as fuel.

Approval of the transaction was neither obtained nor sought from the Federal Power Commission. In 1961, Tennessee constructed a 12-inch connecting pipeline from the field to that company's main interstate transmission system. See *Tennessee Gas Transmission Co.* v. *FPC*, No. 7751, 10 Cir., this day decided.

In substance, the contractual provisions of the Pan American-Tennessee agreement are not legally distinguishable from those considered by the Fifth Circuit recently in *Marr* v. *FPC*, 336 F. 2d 320. There, as here, the thrust of the

Commission's argument to support its claim of jurisdiction lies in its conclusion that the ultimate benefit that accrues to Tennessee is the acquisition of dry gas; that the legal effect of an instrument should be determined from the actuality of the transaction, that Congress intended that the Commission have all necessary powers to regulate the sale of gas in commerce effectively and that, absent jurisdiction of the subject and similar transactions, a regulatory gap exists which defeats the intended purposes of the Commission's creation. Such arguments are but a denial of the Supreme Court decision in *Panhandle*, supra, and can find no comfort in that court's later decision in *Phillips*, supra. The basic distinction between conveyances relating to simple acreage and facilities for production and gathering, over which the Commission has no jurisdiction, and the sale of gas in interstate commerce, over which the Commission does have jurisdiction, is not determined by nor dependent upon the contemplated but unrealized benefit to the parties. The conveyance must trigger the sale of gas in interstate commerce, not just shade the background. *Saturn Oil & Gas Co.* v. *FPC*, 10 Cir., 250 F. 2d 61, 68, cert. denied, 355 U.S. 956. And the parties may deliberately avoid the jurisdiction of the Commission by remaining beyond the bounds of interstate commerce or within the exception to the Commission's regulatory powers in such commerce. *Sunray Mid-Continent Oil Co.* v. *FPC*, 10 Cir., 270 F. 2d 404, 409.

Our inquiry, then, must determine whether the Pan American transfers were leases within the compulsion of *Panhandle*. We conclude, as did the Fifth Circuit in *Marr*, that the subject conveyances were leases and consequently not within the Commission's jurisdiction under section 7 of the Act but were exempt under section 1(b). We are in complete accord with the views expressed by Judge Rives in his able opinion in *Marr* and find them to be equally applicable to the case at bar.

The orders are reversed and the cause remanded to the Commission for further proceedings consistent with the views here expressed.

Judgment

Thirty-Second Day, November Term, Wednesday, December 30th, 1964.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Orie L. Phillips and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on petition to review orders of the Federal Power Commission and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the orders are reversed and the cause remanded to the Federal Power Commission for further proceedings consistent with the views expressed in the opinion of the court.

STATUTE INVOLVED

The Natural Gas Act, 52 Stat. 821, 15 U.S.C. 717-717w, as amended, 56 Stat. 83-84, 15 U.S.C. 717f provides in pertinent part as follows:

Section 7—

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a

certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.